

Decision mailed: 1/28/11  
Civil Service Commission JS

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, SS.**

One Ashburton Place - Room 503  
Boston, MA 02108  
(617) 727-2293

**FRANCINE LYNCH,**  
Appellant

v.

**BOSTON POLICE DEPARTMENT,**  
Respondent

Appellant, Pro Se:

**CASE NO: G1-09-42**

Francine Lynch  
[REDACTED]  
[REDACTED] 2  
[REDACTED]

Appointing Authority's Attorney:

Amanda E. Wall, Esq.  
Office of the Legal Advisor  
One Schroeder Plaza  
Boston, MA 02120  
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HRD Attorney:

Suzanne Shaw, Esq.  
Human Resources Division  
One Ashburton Place  
Boston, MA 02108  
[REDACTED]

Commissioner:

Paul M. Stein

**DECISION ON MOTION TO DISMISS**

The Appellant, Francine Lynch, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31, §2(b), alleging the Massachusetts Human Resources Division (HRD) unlawfully approved her bypass for an original appointment to the position of police officer with the Boston Police Department (BPD). On April 8, 2009, the BPD filed a Motion to Dismiss the appeal. At the scheduled hearing of the motion, on July 20, 2009, the Appellant failed to appear. On July 16, 2009, HRD notified the Commission that it also would not attend but offered to supply any appropriate documentation.

The Commission took the BPD motion under advisement, pending receipt of additional information from HRD. Thereafter, the BPD commenced the process of hiring a new class of police officers and the Appellant, whose name appeared on the current certification, was processed and received a conditional offer of employment for original appointment as a Boston Police Officer. At a status conference held on September 10, 2010, at which both the Appellant and BPD appeared, the parties agreed that, as the Appellant then was being processed for appointment, her bypass appeal was substantially moot, save for the question of whether the Appellant was entitled to a retroactive seniority date based on her original claim of bypass. The Commission suggested the parties discuss the possibility of settlement of this one remaining issue, but the parties were unable to come to an agreement on this point. Accordingly, the Commission now has before it the BPD's original motion to dismiss, along with the Appellant's request for a retroactive seniority date.

#### **FINDINGS OF FACT**

Giving appropriate weight to the submissions of the parties and representation made at the September 7, 2010 status conference, and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Francine Lynch, a qualified disabled veteran, took and passed the civil service examination for original appointment to the position of Boston Police Officer. In the winter of 2007, the BPD requested a number of certifications from HRD for the position of BPD Police Officer. The Appellant's name appeared on Certification # 271116, the main certification, and Certification # 271118, the female certification. She appeared sixth on the main certification (tied with 9 others) and was high enough to be

reached for consideration for appointment and she attended the application orientation for recruit candidates. (*BPD Motion: HRD Submission*)

2. Shortly after attending the orientation, Ms. Lynch discovered that she was pregnant. She contacted the BPD Recruit Investigation Unit to notify BPD of her pregnancy and inquired how to proceed. She was advised that she would not be able to pass the medical screening while she was pregnant. As a result, the Appellant submitted a letter to the BPD stating:

“I respectfully request to withdraw from the current Boston Student Officer application process due to being pregnant. I would like to defer until the next available opportunity. Enclosed is the application packet.

If you have any questions or need additional information, please do not hesitate to call me. Thank you for your understanding and I look forward to the next opportunity.

(*BPD Motion*)

3. The BPD continued to screen applicants from the above Certifications and, eventually, sixty-two candidates successfully completed the process and entered the May 2008 Police Academy. However, due to an unusually high attrition rate, only thirty-seven of the candidates were able to graduate, which left the BPD approximately 30 places short of the number of new police officers needed by the BPD that year. (*BPD Motion*)

4. Rather than request new Certifications, the BPD sought, and HRD approved an extension of Certification #271116,<sup>1</sup> and BPD continued to process additional candidates from that Certification who entered another Police Academy class in December 2008. The BPD proceeded further down the certification to consider candidates who had not been previously considered; it did not go back through the certification and process that

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<sup>1</sup> BPD did not request extension of the female certification (Certification # 271118) because all names on that certification already had been exhausted. (*BPD Motion*)

had already been considered, including those who had withdrawn from the process, those who had received conditional offers of employment but who did not successfully complete the requirements for final employment, and those who BPD bypassed. (*BPD Motion*)

5. As a result of the procedure for selecting applicants as described above, the BPD did not consider the Appellant for inclusion in the December 2008 class of recruits because she had withdrawn her application in December 2007. The Appellant was not provided notice that she had not been considered for the December 2008 class of recruits, nor was she considered to have been bypassed by the BPD and she was not provided a notice of such a bypass decision. (*BPD Motion; Claim of Appeal*)

6. BPD acknowledges that, had BPD requested a new Certification from HRD for selection of candidates to fill the December 2008 academy, the Appellant's name would have been close to the top of that certification and she would have been considered. (*BPD Motion*)

7. As the Appellant has subsequently received a conditional offer of employment and is being processed for final employment with the BPD, there is no issue that the Appellant meets the requirements for original appointment as a BPD Police Officer. (*Oral Representations of the Parties at Status Conference*)

### **CONCLUSION**

The Appellant's original appeal, filed as a bypass appeal under G.L.c.31, Section 2(b), is now substantially moot, and the Commission need not address the BPD's initial argument that the Appellant was not a person "aggrieved" by the action of HRD taken under Section 2(b), since the BPD never "bypassed" her and HRD never took any action that would be appealable under Section 2(b). However, if the Appellant was unlawfully

excluded from consideration for a December 2008 appointment, as a result of the process used by BPD and/or HRD to select candidates from the extended Certification #2711116 (on which she appeared sixth), she would have standing, whether or not the Appellant's claim lies under Section 2(b) or under some other provision of civil service law, to seek equitable relief for that violation of her civil service rights. Indeed, failure to consider her application arguably does seem to run afoul of the express provisions of G.L.c.31, Section 27, which provides:

"If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator [HRD] a written statement of his reasons for appointing the person whose name was not highest." (*emphasis added*)

Here, neither the Appellant's qualification nor her higher standing on the certification are disputed. The only apparent dispute would seem to be whether, by "withdrawing" her application in the first round, the Appellant was no longer deemed "willing to accept" appointment in the second round, and therefore, in effect, no longer considered to be on the list. Based on the clear and undisputed facts of this case, that conclusion would be a fiction that does not square with common sense or equity and fairness, both of which are touchstones of civil service law and rules.

The Appellant's "withdrawal" in December 2007, was due solely to her unplanned pregnancy. It would seem raise serious question of gender discrimination, were the Commission to treat that circumstance as amounting to a "voluntary" waiver of a person's civil service rights. Moreover, pregnancy is a temporal condition, and the Appellant, in withdrawing her application, expressly requested that she be considered for the "next available opportunity." There is nothing to suggest that, the Appellant's 2007 pregnancy would have been any impediment to her being processed for inclusion in the

“next available opportunity”, namely the recruit class scheduled to enter the Police Academy in December 2008. Perhaps, with a newborn, given the rigors of preparing for the Physical Abilities Test (PAT), it might be speculated that the Appellant would have chosen to defer again. Yet, to have failed even to give the Appellant notice and the opportunity to make that choice does appear to have been a violation of the Appellant’s civil service rights “through no fault of her own” that entitle the Commission to grant appropriate equitable relief acting in its discretion under Chapter 310 of the Acts of 1993.

This conclusion does not overlook the BPD’s point that, processing applicants from an extended Certification differs from the processing of applicants from a new Certification for a “new round of hiring.” The Commission has recognized this distinction in its recent decision of Flaherty et al v. Human Resources Div., 22 MCSR 93 (2009), on reconsideration, 22 MCSR 179 (2009).

The Appellant’s case, however, presents quite different facts than those in the Flaherty appeal. The Flaherty appellants had been fully processed, through the extensive background investigations and medical examinations, and had been disqualified based on their failure to pass the PAT. In ultimately deciding that use of the extended certification was a legitimate procedure that met applicable civil service law and rules, so that the BPD was not required to re-consider those two particular appellants a second time, before screening applicants that had not been previously considered once, the Commission majority had in mind that the Flaherty appellants had been disqualified in the initial round of hiring. In addition, the Commission majority rejected the argument that the process, generally, discriminated against women and minorities, finding that women and minorities were, in fact, fully considered ahead of the applicants on the main certification. Id.

Here, however, the Appellant withdrew her application before the BPD actually undertook any extensive screening of her application (which she apparently returned without completing). Moreover, the Appellant was not disqualified for any sound and sufficient reason. She was precluded from pursuing the application solely because of her status as a pregnant woman. Thus, the issue of re-plowing old territory for an applicant who had once failed to demonstrate his or her ability to become a BPD Police Officer does not present itself.

Rather, here, there is no dispute that the Appellant is fully qualified to become a BPD Police Officer, and she never waived from her aspiration or otherwise acted to question her qualification for such a position. Under these very different facts, the Appellant's withdrawal due to her unplanned pregnancy, followed by BPD's failure to provide the Appellant with the "next available opportunity" to pursue her aspiration, as she had expressly requested, so that she would receive consideration for the first time above others lower on the certification whom she outranked, amounted to a loss of her civil service rights through no fault of her own. In contrast to Flaherty, the Appellant's situation seems far more analogous to that in which a veteran applicant is called to active duty and deployed overseas, before his application has been completed, in which case, there has never been a question that such an applicant is entitled to be considered at the "next available opportunity" upon his or her return from deployment.

#### **RELIEF TO BE GRANTED**

Pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, the Commission orders the Human Resources Division to adjust the civil service seniority date of the original appointment of the Appellant, Francine Lynch, as a BPD Police Officer, to December 8, 2008, the same

seniority date of the successful applicants in the "extended round" of appointments from Certification # 271116. This retroactive seniority date is not intended to provide the Appellant with any additional and/or retroactive compensation and should not be used to determine time served in the position of police officer in regard to eligibility for any future civil service promotional examinations.

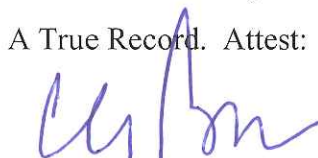
This relief is limited to these specific facts of this case and it is not likely to be applicable to other situations. The BPD's legitimate use of an extension of a certification was prompted by a highly unusual level of attrition from the Police Academy, and can be expected to be a rare occurrence. Similarly, the number of female applicants who become pregnant unexpectedly during the application process would also seem to be small. Thus, relief to this Appellant is likely to have limited, if any, precedential effect to recruitment and processing of future BPD applicants.

Accordingly, for the reasons stated above, the BPD's Motion to Dismiss is denied and the appeal of the Appellant, Francine Lynch, is *allowed in part*.

Civil Service Commission  
  
Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on January 27, 2011.

A True Record. Attest:

  
Commissioner

**Commissioner Marquis was  
absent on January 27, 2011**

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.



Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Francine Lynch (Appellant)

Amanda E. Wall, Esq. (for Appointing Authority)

John Marra, Esq. (for HRD)